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August 6, 2007

Preserving America's Heritage

Mr. Thomas C. Switala
Chief, Regulatory Branch
Buffalo District, Corps of Engineers
1776 Niagara Street
Buffalo, New York 14207-3199

REF: Section 404 Permit for Dredging for Proposed Expansion of the Cleveland Bulk Terminal
Permit Application No. 1999-01471(4)
Whiskey Island, City of Cleveland, Cuyahoga County, Ohio

Dear Mr. Switala:

On June 11, 2007, the Advisory Council on Historic Preservation (ACHP) received your letter and documentation concerning the referenced project. On June 27, 2007, we received additional documentation addressing the comments and concerns raised by consulting parties regarding the coordination of the Section 106 review. In accordance with the ACHP's regulations that implement Section 106, "Protection of Historic Properties," and the provisions of Section 110(k) of the National Historic Preservation Act (NHPA), the Corps has proposed actions that will allow it to address outstanding compliance issues and the requirements of a 2001 lawsuit associated with the referenced undertaking. The ACHP is providing the following comments to assist the Corps in completing its review of the new permit application submitted for the continuing expansion of the Cleveland Bulk Terminals (CBT).

In its recent letters, the Buffalo District, Corps of Engineers (Corps) concludes that Section 110(k) applies to this undertaking. You indicate that although the CBT has been demolished or substantially altered by the applicant, there are "mitigating" circumstances that justify granting a permit. The information provided establishes that the applicant proceeded in accordance with the requirements of a local administrative review process and had appropriate local permits authorizing its actions. Regrettably, what has been overlooked is the fact that the local review did not usurp the applicant's obligation to comply with the applicable Federal statutes, or the Corps's obligation to conclude the Section 106 review prior to the initiation of project activities.

Previous Section 106 review

The current permit application is essentially a revision of a previous permit application that was the subject of much local debate and controversy from 1999 through 2000. In 1999, the Cleveland-Cuyahoga County Port Authority (Port Authority) originally submitted a request to the Corps, for an authorization to perform what it characterized to be 'maintenance' dredging in Cleveland Harbor, Lake Erie, along 2000 feet of the Cleveland Bulk Terminal (CBT) dock face. The CBT is listed on the National Register of Historic Places as the Pennsylvania Railway Ore Dock (PROD). The proposed dredging was a component of a master plan that called for the redevelopment and expansion of the existing terminal. At that time, the Corps informed the Port Authority that the requested 2000 feet of dredging extended beyond the previously authorized

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dredge area and could not be considered 'maintenance' dredging. The Corps, therefore, concluded that it would be necessary to include the proposed development in the upland portion of the CBT in the scope of the undertaking subject to Section 106 review. The Port Authority elected to modify its proposal to limit the maintenance dredging to 600 feet, which led to the Corps making a determination of "no effect" to historic properties.

Ohio SHPO response to the Corps' 1999 "no effect" determination

Prior to obtaining a concurrence from the Ohio State Historic Preservation Officer (SHPO) for its "no effect" determination, the Corps issued a permit to the Port Authority. Based upon this permit and the completion of the local administrative review process, the applicant demolished two of the four Hulettts, contributing elements of the PROD, and dismantled and stored the two remaining Hulettts on site. In addition, the applicant demolished two shunt engines, transferred two other shunt engines to museums, and demolished the machine shop, storage shed, office, shower/lunchroom, and power house in the upland portion of the CBT.

Shortly before demolition commenced, the Ohio SHPO formally objected to the Corps' determination of "no effect." Since demolition had already commenced, the Ohio SHPO and several other organizations contacted the ACHP to request our assistance in limiting further alteration of the historic property. In June of 1999, we notified the Corps that it was in violation of Section 106 because it had not properly resolved the objection raised by the Ohio SHPO with regard to the Corps' determination of "no effect". We subsequently advised the Corps that it had failed to document its completion of the Section 106 review before issuing the permit for dredging, a violation of the NHPA. In response to the ACHP's position, the Committee to Save the Cleveland Hulettts and others filed a lawsuit in December 1999 alleging that the Corps had violated Section 106 as well as the Corps's Appendix C regulations.

The March 30 2001 ruling by the U. S. District Court (Committee to Save Cleveland's Hulettts et al v. U. S. Army Corps of Engineers, 163 F. Supp. 2d 776 (N.D. Ohio 2001)) required the Corps to revoke the previously issued permit and to comply with all the requirements of NHPA should any new permit be sought. The Corps also was required to comply with Section 110k of NHPA when conducting a subsequent review since the issue of anticipatory demolition had never been resolved.

Corps Section 110(k) determination

In conjunction with the Section 106 review for the new permit application submitted by the Port Authority in March 2006 for expanded dredging of the CBT, the Corps is required to evaluate the applicability of Section 110(k) given the previous adverse effects that occurred before the completion of the Section 106 review. This review was also required pursuant to the 2001 court decision. Based upon its investigation of the circumstances that led to the non-compliant demolition and alteration of the CBT in 1999, the Corps has concluded that the applicant was aware of the requirements of Section 106 and did, in fact, segment its application to conduct dredging at the CBT with the intent of circumventing the Section 106 review. The outcome of the segmentation, which was endorsed by the local government, caused unalterable adverse effects to the Hulettts, contributing elements of the PROD.

The Corps has indicated that Section 110(k) does apply to this undertaking, but also asserts that there are "mitigating" circumstances that justify granting the Port Authority a permit. Specifically, the Corps has concluded that the applicant took actions only when authorized by two complimentary resolutions issued by the Cleveland Landmarks Commission (CLC) in July 1999. Upon approval of these resolutions, the CLC issued a certificate of appropriateness, thereby authorizing the Port Authority to proceed with the demolition of the Hulettts and associated

components of the PROD. The mitigation provided for in the resolutions included a salvage inventory and recordation of the property to Historic American Buildings Survey / Historic American Engineering Record (HABS/HAER) standards prior to demolition as well as dismantling and preservation of two of the Hulett's for future reconstruction. Since the Port Authority complied in part with the local requirements, the Corps believes that there is adequate documentation that may serve as a basis for developing a mitigation plan. The Corps also asserts that the proposed expansion of the CBT is viewed as vital to local economic development and in the public interest of the community. Thus, the Corps suggests that the importance of the CBT to the greater Cleveland area's economy is also a mitigating factor.

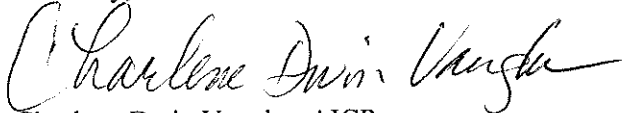
Current Section 106 consultation

Having been intimately involved in the Corps' coordination of the Section 106 review process in 1999 and 2000, the ACHP does not necessarily agree with the Corps' conclusion that there are mitigating circumstances. The ACHP worked diligently with the Corps and the Port Authority to clarify the need to address the Ohio SHPO's objections to the "no effect" determination, which included concerns about project segmentation. More importantly, we appealed to the City to refrain from approving the resolutions that allowed demolition to proceed until the Corps met its Section 106 responsibilities. Our requests fell on deaf ears, resulting in the lawsuit filed by local preservationists.

Since Section 110(k) allows the Federal agency to determine whether it should proceed with the approval of an undertaking, we must respect the Corps' decision to proceed with the Section 106 review process for the expansion of the CBT. Accordingly, the Corps, Ohio SHPO, other consulting parties, and the ACHP must consult to negotiate the terms of an MOA that will address the full range of adverse effects that have occurred, and may occur, on the PROD if the Corps issues the permit. The applicant has proposed an MOA that references the documentation carried out under the historic preservation mitigation plan worked out with the CLC. The proposed MOA also follows suggestions proposed by Cleveland City Councilman Matt Zone, which call for preservation of the most significant parts of the dismantled Hulett's using proceeds from the sale of the remaining parts for scrap. These recommendations are an excellent starting point for the consultation, and should be explored as part of the consideration of alternatives. We would note that some of the other consulting parties believe that another alternative is to reassemble the dismantled Hulett's and make them part of an interpretive exhibit. The Corps should consider all proposed alternatives, evaluating their feasibility by taking into account current conditions of the remaining Hulett's, the availability of sites for interpretation, costs, and long term public benefits.

The ACHP appreciates the Corps' willingness to continue consultation on this matter. By copy of this letter, please be advised that the ACHP will participate in the consultation process and should be copied on all correspondence and reports prepared by the Corps or Port Authority. Should you have any questions or wish to discuss this matter further, please contact Dr. John T. Eddins at 202-606-8553, or by email at jeddins@achp.gov. We look forward to hearing from you soon.

Sincerely,



Charlene Dwin Vaughn, AICP

Assistant Director

Federal Permitting, Licensing, and Assistance Section
Office of Federal Agency Programs